

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHARLES HOLIDAY MALONE,

Defendant-Appellant.

UNPUBLISHED

May 27, 2014

No. 312649

Wayne Circuit Court

LC No. 12-003370-FC

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), third offense, MCL 750.227b. He was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 25 years' imprisonment for the armed robbery conviction, one to five years' imprisonment for the felon-in-possession conviction, and 10 years' imprisonment for the felony-firearm conviction. Defendant appeals by right, and we affirm.

Defendant's convictions arise from the armed robbery of an employee of a liquor and check cashing store. The store employee was sent to the bank to obtain \$30,000 cash in anticipation of cashing checks for customers. When the employee attempted to enter the store with the funds, he was stopped by an armed gunman, defendant, who demanded that the employee place the cash in a black bag. A customer attempted to exit the store and saw the robbery in progress. Additionally, video cameras captured the robbery. Defendant left the store in a damaged black Nissan. Police received a tip that defendant committed the robbery, which prompted photographic line-ups. The employee identified defendant in a photographic line-up and at trial as the perpetrator. When defendant refused to participate in a live line-up, the customer also identified defendant as the robber in a photographic line-up and also at trial.

In contrast, defendant alleged that he had an alibi for the robbery. Specifically, defendant asserted that his girlfriend would provide an alibi. However, the girlfriend testified that defendant dropped her off at work before the robbery occurred. Consequently, defense counsel called defendant's sister, Lillian Malone, and his cousin, Wesley Ellis, to testify that defendant was at his sister's home at the time of the robbery. Despite the presentation of the defense of alibi, defendant was convicted as charged. This Court granted defendant's motion for remand to

address the claim of ineffective assistance of counsel limited to “inquiry into defense counsel’s strategy for calling witnesses Malone and Ellis.” *People v Malone*, unpublished order of the Court of Appeals, entered June 7, 2013 (Docket No. 312649). Following an evidentiary hearing, the trial court did not render specific statements of fact and conclusions of law regarding Malone and Ellis, but concluded that there was “no discernible strategy.”¹

Defendant’s sole issue on appeal is his claim of ineffective assistance of counsel. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *Id.* Findings on questions of fact at a *Ginther*² hearing are reviewed for clear error. *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012). The ultimate question of law, however, is reviewed *novo*. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To the extent this appeal raises issues beyond the scope of the *Ginther* hearing, this Court’s review is limited to mistakes apparent on the existing record. See *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

Both the United States and Michigan Constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). “To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, absent counsel’s errors, the result of the proceeding would have been different.” *People v Douglas*, 296 Mich App 186, 200; 817 NW2d 640 (2012). “There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel’s performance was sound trial strategy.” *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). “[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight.” *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). However, counsel may be found ineffective for the strategy employed when it is not a sound or reasonable strategy. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988). “The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial’s outcome.” *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). The burden of establishing the factual predicate for a claim of ineffective assistance

¹ After the trial court’s decision, appellate defense counsel filed a motion to peremptorily reverse, but the motion was denied. *People v Malone*, unpublished order of the Court of Appeals entered January 14, 2014 (Docket No. 312649).

² *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). We conclude that defendant failed to meet his heavy burden of demonstrating ineffective assistance of counsel.

In support of his claim, defendant first argues that his trial counsel was ineffective for failing to file a proper notice of an alibi defense. Regardless of whether trial counsel's failure to file an alibi notice was an inexcusable oversight,³ defendant cannot establish outcome determinative error where he was allowed to present his alibi defense and call witnesses in support of that defense. In other words, the failure to file an alibi notice did not cause the result of the proceeding to be different. *People v Douglas*, 296 Mich App at 200. Defendant has therefore failed to establish ineffective assistance of counsel on this ground.

Defendant next contends counsel was ineffective for failing to challenge the photo array identification because the robbery victim placed his initials next to two different photos on the identification form.⁴ This argument fails. The touchstone of a defendant's challenge to a photographic lineup is whether, in light of the totality of the circumstances, the lineup was so suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993).

[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Id.* at 306 (citation omitted).]

Here, the robbery victim, who testified with the aid of an interpreter, explained that he did not identify two different photographs. Rather, he indicated at trial that the reason he scratched out his original markings on the identification form was because he did not realize the numbers on the identification form corresponded to numbers on the photo array, and that this misunderstanding caused his initial mistake. No other evidence contradicts this testimony. Thus, defendant failed to show that this identification was unreliable, especially in light of the victim's testimony about the robbery. The victim indicated that he stood within a few feet of defendant and concentrated on defendant's face. Additionally, the victim identified defendant in the photo array only 14 days after the robbery. *Id.* at 311-312. In light of these factors, any objection would have been futile. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) ("Defense counsel is not required to make a meritless motion or a futile objection.")

Regardless, any potential error was harmless in light of the positive identification of defendant at trial by the store customer who was "face to face" with defendant during the

³ At the *Ginther* hearing, defense counsel testified that he was not the first counsel of record and assumed that prior counsel filed the notice.

⁴ Defendant also contends that the photo array was unduly suggestive because he was the only suspect with a beard in the array. The record contradicts defendant's claim, however.

robbery. *People v Adams*, 92 Mich App 619, 625; 285 NW2d 392 (1979) (finding the erroneous admission of a lineup identification harmless where other witnesses identified the defendant as the perpetrator at trial). The victim likewise positively identified defendant as the perpetrator at trial. Accordingly, even if the photo array identification were improper, this testimony rendered the failure to object harmless.⁵

Defendant's argument that counsel was ineffective for calling witnesses who were "extremely damaging" to his case and for failing to interview these witnesses is without merit. The decision to call and question witnesses and present evidence is presumed to be a matter of trial strategy. *Dunigan*, 299 Mich App at 589-590. It only constitutes ineffective assistance if it deprives a defendant of a substantial defense. *Id.* at 589. A substantial defense is one that affects the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Inadequate investigation constitutes ineffective assistance of counsel if it undermines confidence in the trial's outcome. *Grant*, 470 Mich at 493.

As a preliminary point, we note that defendant, himself, implored the court to allow him to call witnesses to present his alibi defense before trial started. A party may not approve of a course of action taken in the trial court and object on appeal. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). To hold otherwise would allow one to harbor error as an appellate parachute. *Id.* at 505. Thus, his assignment of error on this ground is improper at the outset. *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

Again, defendant failed to meet his burden of demonstrating ineffective assistance of counsel. *Hoag*, 460 Mich at 6. First, defendant challenges the calling of his girlfriend, Tyeshia Smith. Defendant claims that, but for Smith's testimony, the jury would not have heard that defendant was connected to Orlando Rush, Smith's father and a former store employee who allegedly told defendant when employees would return to the store from the bank. This ignores, however, that Smith's testimony helped establish a timeline of events regarding defendant's whereabouts on the day of the robbery. Moreover, at the *Ginther* hearing, defendant indicated that he wanted Smith called because she was an alibi witness. In light of this testimony, defendant cannot overcome the presumption that calling Smith was part of counsel's strategy to present an alibi defense.

Next, defendant contends that counsel was ineffective for calling his sister, Lillian Malone, and his cousin, Wesley Ellis. We disagree. Although the trial court ruled at the *Ginther* hearing that counsel lacked any strategy in calling these witnesses, the court made no factual findings in support of this conclusion. This was error, especially considering defense counsel's testimony that the purpose of calling Malone and Ellis was to establish an alibi.

⁵ Defendant claims his counsel was ineffective for failing to pursue a defense of misidentification. But this argument ignores that defense counsel called three alibi witnesses and that defense counsel clearly argued misidentification during his opening statement. It is a meritless point.

A review of the trial testimony reveals that Smith was unable to establish an alibi for defendant because he dropped her off at work before the robbery occurred. Consequently Malone and Ellis were called to establish that defendant was at Malone's home on the day of the robbery. To establish that defendant's relatives could account for defendant's whereabouts on this particular day, Malone testified that she recalled it because her grandmother repeatedly went to the mailbox to see if a check had arrived. Similarly, Ellis testified that he remembered this particular date because he had been to a party the prior evening. It is asserted that trial counsel was ineffective because these witnesses allowed the jury to learn that defendant had access to a dark Nissan Altima, was unemployed, and was "out partying" despite a lack of income. These assertions do not support a claim of ineffective assistance of counsel.

The fact that a witness may provide damaging testimony during cross-examination does not necessarily constitute ineffective assistance of counsel. Evidence may be admitted to aid the trier of fact in evaluating the credibility of a witness. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995). The parties may dispute the credibility of the witnesses and "within limits, produce evidence assailing and supporting their credibility." *Id.* (further citation omitted). "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(c); *People v Ross*, 145 Mich App 483, 489; 378 NW2d 517 (1985).

Although Malone testified that the mother of defendant's child drove a dark Nissan, defense counsel highlighted that the mother had the vehicle a year earlier and there was no evidence that it was available to defendant at the time of the crime. Further, defendant's employment status was not argued or definitively established in the record. Rather, appellate counsel concludes that defendant was unemployed. A review of closing arguments reveals that neither the prosecutor nor the defense submitted that defendant was unemployed. The fact that defendant "hung out" during the day did not foreclose the possibility that he worked evenings or weekends. The prosecutor never argued that defendant's motivation for committing the armed robbery was unemployment or underemployment. The trial court therefore erred in finding no trial strategy here. Malone and Ellis provided an alibi to defendant that Smith's testimony did not support. The presentation of this testimony was not ineffective assistance of counsel.

Finally, the trial court made no specific factual findings concerning whether defense counsel adequately interviewed Malone or Ellis. But even if the court had credited the *Ginther* hearing testimony of defendant, Malone, and Ellis that the witnesses' contact with defendant's attorneys was minimal, this is insufficient to undermine confidence in the trial's outcome. *Grant*, 470 Mich at 493. Indeed, defendant was adamant at trial and at the *Ginther* hearing that he wanted to establish an alibi defense. Thus, even if defense counsel had thoroughly interviewed these witnesses and anticipated the prosecution's cross-examination questions, defendant cannot rebut the presumption that the presentation of these witnesses was sound trial strategy where their testimony accounted for defendant's whereabouts throughout the day of the robbery; they were the witnesses capable of establishing his alibi. Moreover, both the victim and

the store customer positively identified defendant as the perpetrator from a photo array and at trial.⁶ Defendant simply cannot establish ineffective assistance of counsel on this record.⁷

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

⁶ At trial, a videotape and still photographs of the robbery were admitted at trial. The prosecutor argued that a still photograph of the robbery represented a profile of defendant. Defense counsel disputed the quality of the videotape and still photographs. This evidence was not preserved in the lower court record.

⁷ Defendant also suggests that his trial counsel neglected to call helpful witnesses. However, defendant does not specify any witnesses to support this claim and we are unable to review this abandoned issue further. *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998) (a party abandons an issue by failing to brief it).